IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD MARK TURNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 03-048-SLR
	)	
CORRECTIONAL MEDICAL SERVICES, et. al.,	)	
	)	
	)	
Defendants.	)	

Richard Mark Turner, Delaware Correctional Center, Smyrna, Delaware. Plaintiff, pro se.

Richard W. Hubbard, Esquire, Deputy Attorney General, State of Delaware Department of Justice, Wilmington, Delaware. Counsel for Defendants Delaware Department of Corrections, Warden Thomas Carroll and Lt. Downing.

Robert K. Beste, III, Esquire of White and Williams LLP, Wilmington, Delaware. Counsel for Defendant Prison Health Services.

Kevin J. Connors, Esquire of Marshall, Dennehey, Warner, Coleman and Goggin, Wilmington, Delaware. Counsel for Defendant Correctional Medical Services.

MEMORANDUM OPINION

Dated: August 20, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On January 16, 2003, plaintiff Richard Mark Turner filed this action against defendants Delaware Department of Correction ("DOC"), Warden Thomas Carroll ("Carroll"), Lt. Downing ("Downing") (collectively, "the State defendants"), Prison Health Services ("PHS"), Correctional Medical Services ("CMS"), First Medical Services ("FCM"), Dr. Hoffman, Dr. Trivedi, Georgia Perdue, Rob Hamton, Maggie Bailey, Dr. Robinson, Stephan, Dr. Haque, Dr. Vemulapaly, Dr. Tatagari, Nurses Jackie, Andrea, Brenda, Maryann, Aston Pyne, Renae, Paul, Derek, Brian, Jean, Kalisha, Cynthia, Jennifer, Jonnie, Linda, Candice, and Lisa, and John Doe alleging civil rights violations under 42 U.S.C. § 1983 in that inadequate medical care violated his Eighth and Fourteenth Amendment rights. (D.I. 2) Currently before the court is the State defendants' motion to dismiss, PHS's motion to dismiss, CMS' motion to dismiss, plaintiff's motion for appointment of counsel and plaintiff's motion for discovery.[1]

II. BACKGROUND

Plaintiff is an inmate within the Delaware Department of Correction, being held at the Delaware Correctional Center in Smyrna, Delaware. (D.I. 2 at 3) Since April 19, 2000, plaintiff has kept a detailed log of his medical care. (D.I. 74)

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[1]Plaintiff also filed a motion to extend time to respond to PHS' motion to dismiss. Plaintiff subsequently filed his response, thus his motion for an extension of time is moot.

According to plaintiff, "[t]here are two cases which I am suing for, the most recent against CMS and FCM dealing with the infection which I got while on chemotherapy where the deliberate indifference of the medical department very nearly cost me my life. The other case was the case against PHS which had to do with neglectful treatment by PHS which caused me to have to have a very delicate fistula surgery for which I am still having problems with." (D.I. 53 at 1-2)

III. STANDARD OF REVIEW

In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Where the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-521 (1972);

Gibbs v. Roman, 116 F.3d 83, 86 n.6 (3d Cir. 1997); Urrutia v. Harrisburg County Police Dep't, 91 F.3d 451, 456 (3d Cir. 1996). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

IV. DISCUSSION

A. PHS' Motion to Dismiss

PHS ceased providing medical services within the State of Delaware on June 30, 2000. PHS argues that plaintiff's claims as to PHS are barred by the statute of limitations.

For statute of limitations purposes, section 1983 claims are characterized as personal injury claims. See Wilson v. Garcia, 471 U.S. 261, 275 (1985). Courts apply the state statute of limitations for personal injury claims in order to determine the statute of limitations period. See id. Thus, in Delaware, section 1983 claims are subject to the two-year statute of limitations period defined in 10 Del. C. § 8119. See McDowell v. Delaware State Police, 88 F.3d 188, 190 (3d Cir. 1996); see also Gibbs v. Deckers, 234 F. Supp. 2d 458, 461 (D. Del. 2002). A section 1983 claim accrues "when a plaintiff knows or has reason to know of the injury that forms the basis of his or her cause of action." Johnson v. Cullen, 925 F. Supp. 244, 248 (D. Del. 1996).

In the case at bar, plaintiff filed his complaint on January 16, 2003. Thus, the applicable statute of limitations bars plaintiff from bringing suit for any injuries he knew of prior to January 16, 2001. It is clear from plaintiff's daily journal and his response to PHS' motion to dismiss that he was aware of the alleged injuries caused by PHS well before January 16, 2001. (D.I. 53, 74) Plaintiff alleges that many of his injuries were a result of an undiagnosed high e-coli bacteria count, but he acknowledges that he learned of the problem in November or December 2000. (D.I. 53 at 6) Plaintiff further admits that he had a lawsuit against PHS prepared a few years ago but tore it up and forgave PHS. (Id. at 7) The court, therefore, finds that plaintiff's claims against PHS are barred by the statute of limitations.

B. CMS' Motion to Dismiss

CMS provided medical services within the State of Delaware from July 1, 2000 through June 30, 2002. CMS argues that plaintiff's complaint only references medical treatment received in September 2002. Thus, CMS argues, they cannot be held liable for plaintiff's claims. The court disagrees. Although plaintiff provides few specific dates in his complaint, it is clear from plaintiff's statement of facts that the allegedly inadequate medical treatment occurred well prior to September 2002 and during the time CMS provided medical care. (D.I. 2 at 6-8)

Plaintiff further detailed the allegations against CMS in his response to CMS' motion to dismiss and in his journal entries. (D.I. 72, 74) Where the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-521 (1972). CMS' motion to dismiss is denied.

C. State Defendants' Motion to Dismiss

1. Exhaustion of Administrative Remedies

The State defendants argue that plaintiff did not exhaust his administrative remedies prior to filing this action pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a).[2] Before filing a civil action, a plaintiff-inmate must exhaust his administrative remedies, even if the ultimate relief sought is not available through the administrative process. See Booth v. Churner, 206 F.3d 289, 300 (3d Cir. 2000), cert. granted, 531 U.S. 956 (2000), aff'd, 121 S. Ct. 1819 (2001); see also Ahmed v. Sromovski, 103 F. Supp. 2d 838, 843 (E.D. Pa. 2000) (quoting Nyhuis v. Reno, 204 F.3d 65, 73 (3d Cir. 2000) (stating that § 1997e(a) "specifically mandates that inmate-plaintiffs

[2]The PLRA provides, in pertinent part:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

exhaust their available administrative remedies"). Prison conditions have been held to include the "environment in which prisoners live, the physical conditions of that environment, and the nature of the services provided therein." Booth, 206 F.3d at 295.

Plaintiff alleges that he has filed grievances in the past and specifically points to a grievance filed in December 2002.[3] As plaintiff has shown that he filed a grievance, the burden shifts to defendants to prove that he failed to exhaust the grievance procedure. The State defendants' have failed to meet their burden. Thus, the State defendants' motion to dismiss based on plaintiff's failure to exhaust administrative remedies is denied.

2. Immunity

The State defendants argue that the complaint against the DOC must be dismissed based on Eleventh Amendment immunity. The State defendants also contend that Carroll and Downing cannot be held liable in their official capacities under the Eleventh

[3]The court notes that the State defendants originally submitted a brief on June 6, 2003 alleging that plaintiff has filed no grievances regarding his medical treatment. The State defendants' brief includes an unsigned affidavit from Lise Merson with a computer log showing no grievances filed by plaintiff. On June 11, 2003, plaintiff wrote a letter to Warden Carroll complaining that the grievance log had been manipulated to delete his December 2002 grievance. Plaintiff provided a copy of the December 2002 grievance. On June 13, 2003, the State defendants wrote to the court requesting page substitutions in their brief and noting an "inaccuracy" in the computer log.

Amendment. "[I]n the absence of consent, a suit [in federal court] in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). This preclusion from suit includes state officials when "the state is the real, substantial party in interest." Id. at 101 (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)). "Relief sought nominally against an [official] is in fact against the sovereign if the decree would operate against the latter." Id. (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963)). A State, however, may waive its immunity under the Eleventh Amendment. Such waiver must be in the form of an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." Ospina v. Dep't of Corrs., 749 F. Supp. 572, 578 (D. Del. 1990) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n. 1 (1985)). Because the State of Delaware has not consented to plaintiff's suit or waived its immunity, the Eleventh Amendment protects the DOC from liability and defendants Carroll and Downing from liability in their official capacities.

D. Plaintiff's Motion for Discovery and Appointment of Counsel

Plaintiff's motion for discovery requests that CMS, FCM and the DOC (1) "[p]rovide all medical records and all the names of

doctors, nurses, medical staff, [Department of Corrections] staff and those who had anything to do with plaintiff during the time period listed in the complaint that are in your possession, in storage, on film, or kept by any other means for keeping such records" and (2) "provide all proper last names, addresses, and current employment situation as well as insurance information for all those listed as defendants." Plaintiff's motion for discovery is granted. Defendants CMS, FCM and the DOC are to provide the court and plaintiff with any and all documentation, created since January 16, 2001, related to plaintiff's medical condition. Further, CMS, FCM and the DOC are to provide the court and plaintiff with the names and addresses of the remaining named defendants, to the extent known, for the purpose of effectuating service.

Plaintiff's motion for representation by counsel is denied without prejudice to renew. Plaintiff, a pro se litigant proceeding in forma pauperis, has no constitutional or statutory right to representation by counsel. See Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981). It is within the court's discretion, however, to seek representation by counsel for plaintiff, but this effort is made only "upon a showing of special circumstances indicating the likelihood of substantial prejudice to [plaintiff] resulting . . . from [plaintiff's] probable inability without such assistance to present the facts

and legal issues to the court in a complex but arguably meritorious case." Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984). Having reviewed plaintiff's complaint, the court finds that plaintiff's allegations are not of such a complex nature that representation by counsel is warranted at this time.

V. CONCLUSION

For the reasons stated, PHS' motion to dismiss is granted, CMS' motion to dismiss is denied and the State defendants' motion to dismiss is granted in part and denied in part. Plaintiff's motion for discovery is granted and plaintiff's motion for appointment of counsel is denied. An appropriate order shall issue.

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	)	
	)	
Defendants.	)	

O R D E R

At Wilmington this 20th day of August, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1) Defendant Prison Health Services' motion to dismiss (D.I. 25) is granted.

2) Defendant Correctional Medical Services' motion to dismiss (D.I. 66) is denied.

3) Defendant the Delaware Department of Correction's motion to dismiss (D.I. 51) is granted.

4) Defendants Warden Thomas Carroll and Lt. Downing's motion to dismiss the claims against defendants in their official capacities (D.I. 51) is granted.

5) Defendants Warden Thomas Carroll and Lt. Downing's motion to dismiss the claims against defendants in their individual capacities (D.I. 51) is denied.

6) Plaintiff's motion for discovery (D.I. 5) is granted.

7) Plaintiff's motion for an extension of time (D.I. 68) is denied as moot.

8) Plaintiff's motions for appointment of counsel (D.I. 3, 71) are denied.

Sue L. Robinson
United States District Judge